Ooi Mei Chein @ Wei Mei Chein v Micheal Tan Cheng Hai & Anor

HIGH COURT (PULAU PINANG) — DIVORCE PETITION NO 33–727–07/2013
S NANTHA BALAN JC
18 DECEMBER 2013

Family Law — Children — Custodianship — Application for custody and care of children — Welfare of children paramount consideration — Whether it would be in best interest of son to be relocated to Butterworth in terms of upbringing, residence and schooling — Whether relocation disruptive — Whether in best interests not to separate siblings — Whether petitioner could provide better home environment — Whether application should be allowed — Access — Whether respondent should be granted generous amount of access to children — Maintenance — Maintenance of wife and children — Respondent current financial status — Whether respondent was in position to pay maintenance claimed

The petitioner wife (the PW) and the respondent husband (the RH), who had been married for 25 years, had two children, namely Stanley (ST) and Megan (MT). During the early and major portion of their married life, when the RH's income was considerably lower than the PW's, she contributed to 2/3 of the family expenses and 100% for the accumulation of the matrimonial assets. However, sometime in 2012, the RH started venturing into logistics businesses and his income increased considerably. At about the same time the PW discovered that the RH had been having an affair with the second respondent, and that this involvement caused a drastic change in his relationship with the PW, his children and his mother, who all lived together in the matrimonial home in Penang. Eventually the couple quarreled and the PW left the matrimonial home with her daughter MT to stay at her parents' residence in Butterworth. Since then, ST continued to live in the matrimonial home and was taken care of by the RH's mother, whilst the RH moved to a condominium in KL purportedly because his job required him to be there. When attempts at a reconciliation between the parties failed, the PW filed the present petition for divorce and an application for inter alia, care, custody and control of the two children with the RH to be given reasonable access, and maintenance in the sum of RM15,000, ie RM5,000 each for the PW and the two children. Although STpreferred to live with the RH and his paternal grandmother in the matrimonial home, the PW argued that she could provide a better home environment than the RH. The RH wanted ST to remain with him in the matrimonial home as he felt that despite his work schedule he could still play a meaningful role parenting ST, with his mother there to help when he was away in KL. However, the PW argued that if given custody the RH would just

delegate his responsibility to his mother, which was no substitute for personal supervision and monitoring. The PW also submitted that the RH's mother was quite old and incapable of looking after ST in that she was not a person who could exert authority over ST and supervise his studies and control his behaviour. As regards the RH's ability to pay the maintenance sum of RM15,000 claimed, the PW submitted that the RH ought to be deemed to be in a position to pay the maintenance as claimed. It was the PW's contention that since the RH had failed to make a full and frank disclosure of his actual income for 2012 or 2013, an adverse inference ought to be drawn against him.

Held, dissolving the marriage and making the appropriate orders for custody of the children and maintenance with costs of RM8,000 to be paid by the RH to the PW:

(1) In the long term it would be in the best interest of ST if he relocated to Butterworth and was brought up by the PW. This move, which would entail a host of arrangements beginning with a change of school, could cause ST to resent the PW and also demonstrate his resentment by not applying himself to his studies. However, the fact remained that the RH was not in Penang for the most part of the week to supervise and guide ST. Although the fact that the RH had to be in KL for the most part of the week did not of itself disqualify him as a suitable parent, it was clear that the present arrangement vis-a-vis ST should not remain. The disruption, if any caused by uprooting ST from Penang, would only be transient and would persist only in the initial stages of the process of readjustment. As such, it was unlikely to cause any major physical, emotional or social issues in the long term. Also, given the close proximity between Penang and Butterworth, the relocation could not be regarded as truly disruptive. In the present circumstances, only the PW could play a meaningful parental role vis-a-vis ST in terms of his academic progress, which is the single most important aspect of family life ie for children to succeed academically and be well placed in life in terms of a proper job (see para 31 & 41–43).

(2) Further it would not be in ST's best interests if he were to be separated from his sister MT and they should be together under one roof in order to find support and encouragement from each other as siblings (see para 40).

(3) There was merit in the PW's submission that her parents' Butterworth residence could provide the requisite environment for her children. The fact that the PW's father was one of the pioneer members to set-up Chung Ling High School in Butterworth and had been a member of the Board of Governors of the School and the fact that the PW's younger brother who stays in the PW's parents' residence is the chairman of the Board of Governors for Chung Hwa Primary School were important

factors leaning in favour of granting custody of ST to the PW. ST would be better placed if he were under the PW's supervision rather than be given the freedom to do as he pleased in the uncontrolled and unsupervised environment where the only adult who was mostly around was ST's paternal grandmother (see para 44).

(4) The order granting care, control and custody of the two children to the PW was predicated on the children's best interests, which was of paramount consideration. The order should not be regarded as punitive towards the RH, who was granted a generous amount of weekend/holiday access to both ST and MT (see paras 45, 71–75).

(5) The affidavits of the RH and the documents exhibited therein had not revealed the true state of the RH's financial position. In fact, there had been selective presentation of the financial affairs of the RH. Based on the evidence, it was hardly unlikely that the RH could only offer RM3,500 as child maintenance and no maintenance at all for the PW. Instead, after taking all facts and circumstances into consideration it would be more appropriate that the RH should contribute a minimum of RM10,000 towards child and wife maintenance, apportioned into RM4,000 as wife maintenance and RM6,000 as child maintenance (globally) for both ST and MT (see paras 67–70).

[Bahasa Malaysia summary

Pempetisyen isteri ('PI') dan responden suami ('RS'), yang telah berkahwin selama 25 tahun, mempunyai dua orang anak, iaitu Stanley ('ST') dan Megan ('MT'). Semasa kehidupan awal dan sebahagian besar perkahwinan mereka, pendapatan RS agak rendah berbanding dengan PI, PI telah menyumbang 2/3 perbelanjaan keluarga dan 100% untuk pengumpulan aset perkahwinan. Walau bagaimanapun, sekitar tahun 2012, RS telah mula menceburi dalam perniagaan logistik dan pendapatannya meningkat dengan ketara. Pada masa yang sama PI mendapati bahawa RS telah mengadakan hubungan sulit dengan responden kedua, dan penglibatan ini menyebabkan perubahan mendadak dalam hubungannya dengan PI, anak-anak dan ibunya, kesemuanya tinggal di rumah perkahwinan di Pulau Pinang. Akhirnya pasangan itu bergaduh dan PI telah meninggalkan rumah perkahwinan itu bersama-sama anak perempuan mereka, MT, untuk tinggal di kediaman ibubapanya di Butterworth. Sejak itu, ST terus tinggal di rumah perkahwinan itu dan telah dijaga oleh ibu RS, manakala RS telah berpindah ke kondominium di Kuala Lumpur ('KL') kononnya atas sebab pekerjaannya menghendakinya berada di situ. Apabila percubaan untuk berbaik semula antara pihak-pihak gagal, PI telah memfailkan petisyen ini untuk bercerai dan permohonan untuk, antara lain, jagaan, hak penjagaan dan kawalan ke atas dua orang anaknya yang mana RS diberikan akses sewajarnya, dan nafkah berjumlah RM15,000, iaitu RM5,000 untuk setiap seorang, iaitu PI dan dua orang anak tersebut. Walaupun ST lebih suka tinggal dengan RS dan nenek sebelah bapanya di rumah perkahwinan itu,

PI berujah bahawa dia mampu memberikan persekitaran rumah lebih baik daripada RS. RS ingin ST kekal tinggal bersamanya di rumah perkahwinan kerana dia berasa meskipun jadual kerjanya dia masih boleh memainkan peranan bermakna sebagai seorang bapa ST, bersama ibunya di situ yang boleh membantunya apabila dia ke KL. Namun begitu, PI berhujah bahawa jika diberikan hak penjagaan RS hanya akan menyerahkan tanggungjawabnya kepada ibunya, yang bukan merupakan pengganti sesuai untuk pengawasan dan pemantauan peribadi. PI juga bethe RHujah bahawa ibu RS agak tua dan tidak berupaya untuk menjaga ST di mana dia bukan seorang yang boleh mengarah ST dan memantau pelajarannya dan mengawal kelakuannya. Berhubung kemampuan RS untuk membayar nafkah sejumlah RM15,000 yang dituntut, PI berhujah bahawa RS patut dianggap berada dalam kedudukan untuk membayar nafkah sebagaimana dituntut. Adalah hujah PI bahawa oleh kerana RS telah gagal untuk membuat penzahiran penuh dan jujur tentang pendapatan sebenarnya untuk 2012 atau 2013, suatu inferens bertentangan patut dibuat terhadapnya.

Diputuskan, membubarkan perkahwinan dan membuat perintah-perintah sesuai untuk hak penjagaan anak-anak dan nafkah dengan kos RM8,000 dibayar oleh RS kepada PI:

(1) Untuk tempoh jangka panjang adalah demi kepentingan ST jika dia berpindah ke Butterworth dan dibesarkan oleh PI. Langkah ini, yang akan melibatkan pelbagai urusan bermula dengan pertukaran sekolah, yang boleh menyebabkan ST membenci PI dan juga menunjukkan kemarahannya dengan tidak menumpukan perhatian kepada pelajarannya. Walau bagaimanapun, hakikatnya RS tidak ke Pulau Pinang untuk sebahagian dalam seminggu untuk mengawasi dan membimbing ST. Walaupun pada hakikatnya RS perlu berada di KL sebahagian besar dalam seminggu tidak akan dengan sendirinya menjadikannya hilang kelayakan sebagai seorang bapa yang sesuai, adalah jelas urusan sekarang berhubung ST tidak patut dikekalkan. Gangguan ini, jikapun ada yang menyebabkan perpindahan ST dari Pulau Pinang, hanyalah sementara dan hanya akan berlarutan di peringkat awal proses penyesuaian semula. Oleh itu, ia tidak berkemungkinan akan menyebabkan timbul apa-apa isu fizikal, emosi atau sosial dalam tempoh jangka panjang. Juga, berdasarkan jarak dekat antara Pulau Pinang dan Butterworth, pemindahan semula itu tidak boleh dianggap sebagai benar-benar mengganggu. Dalam keadaan ini, hanya PI boleh memainkan peranan sebagai ibu bapa kepada ST berdasarkan prestasi akademiknya, yang merupakan satu-satunya aspek paling penting dalam kehidupan keluarga iaitu untuk anak-anak berjaya dalam bidang akademik dan memperoleh pekerjaan yang baik dalam hidup (lihat perenggan 31 & 41–43).

(2) Selanjutnya ia bukan demi kebaikan ST jika dia diasingkan daripada adik

perempuannya MT dan mereka patut bersama di bawah satu bumbung agar dapat memberi sokongan dan galakan antara satu sama lain sebagai adik-beradik (lihat perenggan 40).

(3) Terdapat merit dalam hujah PI bahawa kepentingan ibu bapanya di Butterworth boleh memberikan persekitaran yang diperlukan untuk anak-anaknya. Hakikat bahawa bapa PI merupakan salah seorang anggota pengasas yang menubuhkan Sekolah Tinggi Chung Ling di Butterworth dan telah menjadi anggota Lembaga Gabenor-Gabenor Sekolah itu dan hakikat bahawa adik lelaki PI yang tinggal di kediaman ibu bapa PI adalah pengerusi Lembaga Gabenor-Gabenor untuk Sekolah Rendah Chung Hwa adalah faktor-faktor penting yang menyebelahi pemberian hak penjagaan ST kepada PI. ST dalam keadaan lebih baik jika dia berada di bawah pengawasan PI daripada diberikan kebebasan untuk berbuat sesuka hatinya dalam persekitaran tidak terkawal atau tanpa pengawasan di mana satu-satunya orang dewasa yang sering berada bersama ST adalah nenek sebelah bapa ST (lihat perenggan 44).

(4) Perintah memberi jagaan, kawalan dan hak penjagaan ke atas kedua-dua anak-anak itu kepada PI adalah berdasarkan demi kebaikan anak-anak itu, yang merupakan pertimbangan paling utama. Perintah itu tidak patut dianggap sebagai hukuman terhadap RS, yang telah diberikan akses kepada ST dan MT pada hujung minggu/cuti (lihat perenggan 45, 71–75).

(5) Afidavit-afidavit RS dan dokumen-dokumen yang diekshibitkan dalamnya tidak menunjukkan keadaan sebenar kedudukan kewangan RS. Bahkan, terdapat pembentangan selektif berhubung hal ehwal kewangan RS. Berdasarkan keterangan itu, adalah tidak mungkin yang RS hanya boleh memberi RM3,500 sebagai nafkah anak dan tiada nafkah langsung untuk PI. Sebaliknya, selepas mengambil kira semua fakta dan keadaan untuk dipertimbangkan adalah lebih sesuai agar RS menyumbang RM10,000 untuk nafkah anak dan isteri, dibahagikan kepada RM4,000 untuk nafkah isteri dan RM6,000 untuk nafkah anak (secara global) untuk kedua-dua ST dan MT (lihat perenggan 67–70).]

Notes

For cases on custodianship, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3454–3551.

Cases referred to

Koay Cheng Eng v Linda Herawati Santoso [2008] 4 MLJ 863; [2008] 4 CLJ 105, CA (refd)

Leow Kooi Wah v Philip Ng Kok Seng & Anor [1997] 3 MLJ 133, HC (refd)

Shirley Koo v Kenneth Mok Kong Chua [1989] 2 MLJ 264, HC (refd)

Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2000] 6 MLJ 48; [2000] 3 CLJ 175, HC (folld)
W v W (No 3) [1962] 1 All ER 736 (refd)
Young v Young [2013] EWHC 3637 Fam (folld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 102, 104
Married Women and Children (Enforcement of Maintenance) Act 1968 s 4

Lalitha Menon (Lalitha Menon & Associates) for the plaintiff.
Amareson a/l K Velu (Amareson & Meera) for the defendant.

S Nantha Balan JC:

BACKGROUND FACTS

[1] The petitioner/wife ('the PW') and the first respondent/husband ('the RH') have been married for more than 25 years. The PW is a Treasury and Commercial Administration Director at Osram Opto Semiconductors (M) Sdn Bhd whereas the RH is the Vice President of Marketing for Virtual Volt (M) Sdn Bhd and owner/shareholder of various businesses. Previously the RH worked as a Branch Manager of Neptune Freight Services Sdn Bhd and was earning a not inconsiderable sum of around RM10,000 per month.

[2] They have two children, Stanley Tan Yun Chih (14 years) ('ST'), who at the time of hearing of this application was in Form One at Heng Ee High School in Penang and Megan Tan Rou Yi (11 years) ('MT'), who was in Primary Five at Chung Hwa Primary School (1) Butterworth. The parties lived together with the children and the RH's mother, Mdm Lee (aged 72) at No 11A, Jalan Azyze, Tanjung Bungah, 11200 Penang ('the matrimonial home').

[3] For the major portion of their married life the PW's income as compared with the RH's was in the proportion of 75%:25% and the RH's income was only enough to pay 1/3 of the family expenses and there was nothing left of it to pay for any accumulation of matrimonial assets. Nonetheless, the PW utilised all of her salary, bonuses, incentives and monies received or borrowed and EPF withdrawals to pay the remaining 2/3 portion of the family expenses and the balance went towards renovation and furnishing of/equipment of the matrimonial home and accumulation of the matrimonial assets (see: para 13 encl 7). In addition the PW also contributed in kind by her discharging her responsibilities as a wife, mother and daughter-in-law. Apparently the PW had to bear 100% of the family expenses during the periods when the RH was jobless.

[4] In 2012 the RH started venturing into logistics businesses via companies he owned personally or via his agents, either wholly or partly, whilst still working as a branch manager of Neptune Freight Services Sdn Bhd and his income increased considerably as a result.

[5] Sometime in 2012 the PW discovered that the RH had been having an affair with the second respondent ('the co-respondent') whom he met on one of his trips to China and since then the RH has been making regular trips to China, purportedly on business, until it became at least a trip a month lasting half the month, even during the Chinese New Year period in 2013. Besides the RH's own admission of his adultery, the PW also found intimate photographs of the RH with the co-respondent in the RH's external hard disk.

[6] According to the PW, the RH's involvement with the co-respondent led to several drastic changes in his attitude and relationship with the family members in that he:

(a) became obsessed with developing his physique and becoming younger looking;

(b) became more aggressive, short-tempered and impatient with the PW, the children, the maid and even his mother and often used a very harsh tone of voice and adopted an offensive and defensive manner when speaking to them;

(c) displayed little or no affection or consideration to the PW and the children;

(d) was away from home/country more often and even when in Penang preferred to spend his time out of the house;

(e) became more distant and less communicative with the PW and his mother;

(f) spent a lot of time especially at night making secretive calls/chatting on-line;

(g) started telling a lot of lies;

(h) stopped wearing the wedding ring and removed the PW's photo from his wallet;

(i) from mid-2012 slept in a separate room and no longer had intimacy with the PW;

(j) called off the family holiday to Bangkok which had been planned earlier;

(k) stopped bearing or contributing towards the household expenses;

(l) made large withdrawals from the joint funds contributed largely by the PW to pay for his credit cards, and to make personal investments without the PW's knowledge or consent;

(m) stopped banking his salary/income into the joint account and kept earnings from his various business ventures from the joint pool; and

(n) did not bother to pay for the Chinese New Year expenses for 2013 and spent two weeks in China during the Chinese New Year;

[7] When the RH returned from his trip to China the parties quarrelled and the PW eventually left the matrimonial home on 26 February 2013 with MT to stay at her parents' house No 2 Lorong Aman 7, Taman Robina, 13050, Butterworth, Penang ('the Butterworth residence').

[8] Apparently, the RH refused to take them back home from her parents' home although requested by the PW. The PW and MT have remained in Butterworth since then whilst ST continues to live in the matrimonial home and is taken care of by Mdm Lee.

[9] The RH moved to Kuala Lumpur in March 2013 purportedly because his job required him to be there.

[10] The PW later discovered that the RH had in fact moved into a luxury condominium unit with the co-respondent and that he only worked from home.

[11] The RH has failed to maintain the PW and MT since the day they left the matrimonial home.

[12] The RH maintains his mother and ST partially, and visits them every ten days or so.

[13] After the RH rebuffed the PW's attempts at reconciliation the PW referred her problems to the marriage tribunal and filed this petition for divorce on 31 July 2013. At the same time the PW filed encl 6 for the following orders against the RH:

(a) that the PW may be granted interim care, custody and control of ST and MT;

(b) that the RH be given reasonable access to both children provided that he does not take them overseas without the written consent of PW;

(c) that the RH pay the PW a monthly sum of RM5,000, subject to an annual increment of 8%pa at the beginning of each calendar year, as maintenance for the PW;

(d) that the RH pay the PW a monthly sum of RM5,000, subject to an annual increment of 8%pa at the beginning of each calendar year, as maintenance for each child;

(e) that the RH pay the maintenance ordered to be paid on the first day and not later than the 7th day of each month with effect from 1 March 2013 for the PW and MT and with effect from the date of order for ST;

(f) that the RH pay all the arrears of maintenance within one month from the date of order;

(g) that the RH's salary/income be attached pursuant to s 4 of the Married Women and Children (Enforcement of Maintenance) Act 1968 (Revised 1988) to pay the PW's and the children's monthly maintenance as ordered;

(h) that an injunction be granted pursuant to s 102 of the Law Reform (Marriage and Divorce) Act 1976 pending the disposal of this divorce petition restraining the RH whether by himself, his agents or servants from disposing of any part of the matrimonial assets held by the RH solely or jointly with the PW or with any other person or by any other person upon trust for the RH;

(i) that the injunction referred to in (h) above be granted ex parte forthwith;

(j) that the RH pay the costs of, and occasioned by, this application; and

(k) that the PW may be granted such further or other relief as the honourable court may deem fit and proper in the circumstances.

[14] An ex parte order in terms of prayer (h) was granted on 16 August 2013 and served personally on the RH on 23 August 2013. At the inter parte hearing on 28 August 2013, the RH appeared by his counsel, Mr V Amareson and agreed to a consent order being recorded for the s 106 injunction until further order. The inter parte hearing of encl 6 was adjourned to another date to enable the RH to reply to the PW's affidavit in support. Since then further affidavits have been filed and the matter fixed for hearing on various dates.

[15] Parties had agreed that prayer (h) of encl 6 be allowed by consent. Hence, the dispute between the PW and the RH vis a vis encl 6 revolved solely around the issue maintenance for ST/MT and the PW and custody of ST. Since the break-up of the marriage in or around March 2013, ST lives with the RH in the matrimonial home whereas the PW moved out of that house and took MT with her. Mdm Lee stays with the RH and ST in the matrimonial home.

The PW works in Penang and stays in the Butterworth residence. There are other members of the extended family who stay in the Butterworth residence. In so far as the RH is concerned, the nature of the RH's work is such that he is for most part of the week in Kuala Lumpur and comes back to Penang during weekends.

SUBMISSIONS ON CUSTODY CARE AND CONTROL

[16] At the outset, it is important to note that there is no issue as regards custody, care and control of MT as the RH was quite content to let MT be brought up by the PW. But the RH wanted ST to remain with him in the matrimonial home as he felt that despite his work schedule he could still play a meaningful role parenting ST. Also his mother Mdm Lee was there to help the RH in looking after ST. The main points of submissions made by counsel for the PW in seeking to be given custody, care and control of ST are as follows:

(a) The issue of who should have custody of ST should not turn on ST's own feelings about where he wishes to stay but rather the overriding consideration should be based on what would be best for his welfare.;

(b) In his affidavits, the RH has not stated any grounds to show that ST's welfare would not be best met if custody is given to the PW. His only ground for saying that he should have custody and that ST should continue living at the matrimonial home (and that is a ground that has been raised only in the course of hearings in chambers and not in any affidavit), is that ST prefers to continue living at the matrimonial home with his grandmother. ST himself confirms this preference;

(c) the PW says that it is no surprise that ST wants to continue living in the matrimonial home where he is king and his grandmother is just his handmaiden, cooking his favorite dishes, doing his washing and driving him around at her age without imposing the strict discipline that he would be subjected to if he were to live with the PW and her extended family at her parents' house ie the Butterworth residence;

(d) At the matrimonial home ST just has to contend with one old lady whom he could easily shout at to get her to stop her from bothering him and the occasional inquiries of his father living miles away who would be easily pacified with assurances/lies that he had done his homework or studies whereas if he were to live with the PW he would be answerable to, and be under the watchful eye, of not just the PW but also her parents and his uncles and aunts who live there;

(e) Given the choice between lax, minimal discipline and supervision and having someone watching and correcting him all the time, no teenager will opt for the latter. Ms Lalitha Menon (counsel for the PW) said that therefore the boy's expressed wishes cannot and should not override the primary consideration of what is best for his welfare;

(f) According to counsel for the PW, giving custody of ST to the RH cannot be

in the best interests of ST as the RH has confirmed that he has to work in Kuala Lumpur and will not be around five days in the week to see to it that ST is properly supervised in his upbringing and in his studies. He has admitted that he can only be in Penang for the weekends. This is the current position during a period where he claims his projects have not materialised. It will become more acute when his projects take off and he is unable to return even for the weekends;

(g) Thus, it was contended on behalf of the PW that if given custody, the RH will just delegate his responsibility to his mother (Mdm Lee) and play nothing more than a superficial role in the boy's supervision and development;

(h) To the extent that the RH is relying on the tuition that ST is taking, the PW says that that is no substitute for personal supervision and monitoring. It is clear from the report cards produced by the RH in his third affidavit (encl 26), that the tuition classes are ineffective as there has only been minimal, if any, improvement;

(i) the PW has asked that this court reject ST's excuse that he has never been good in his studies anyway. She says that ST is at an age where he has to be pushed hard to buck up academically otherwise he would be left far behind when it matters most;

(j) Even if it is true that it was the RH who used to coach the children when they lived together, the fact remains that the RH abandoned that role a long time ago and will no longer be able to do so long-distance. This means that it is the RH's mother who will have the responsibility of looking after ST for at least five days in a week;

(k) As for the RH's mother, Mdm Lee, it cannot be denied that despite her best intentions, she is 72 and her ability to discipline the boy is superseded by her ability to spoil him by doting on him as an expression of her love for him. She is also not in a position to handle an emergency situation if one should arise. She has poor eyesight, is unsteady in driving and forgetful as is typical of one her age. Most grandparents are guilty of that;

(l) the PW says that the RH's argument that ST is in a very good, if not the best, school on the island is not acceptable, as the fact remains that ST's results have not shown much improvement. The PW says that there is an equally good school on the mainland, that is, Chung Ling High School Butterworth, which incidentally is the RH's, alma mater, to which ST can be transferred. As for the concern that any transfer to Butterworth would cause ST to lose his circle of friends, the PW says that that can hardly be an issue as most of ST's friends are from his primary school who are anyway not in the same school that ST is in presently;

(m) She surmises that ST just does not want to move from his current comfort zone and is resisting change although for most teenagers change is the only constant;

(n) It was submitted that taking a child from an environment he is used to is not necessarily against his long term interest. See: *Sim Hong Boon v Lois*

Joan Sim [1973] 1 MLJ 1 where it was held that the primary consideration is not the immediate readjustment caused by the relocation but the long term adjustment until the child is able to look after himself;

(o) It was submitted for the PW that unlike the RH, the PW is willing to take on the heavy and pethe RHaps unenviable task of taking the boy under her wing and working on building up his character and academic development with the help of her family members.

(p) Since the PW is living with an extended family it will be useful for ST to learn to share with other people and to care for others. It is imperative for the welfare of ST that the PW be given the opportunity to do so, given the fact that the RH is not in a position to do so;

(q) the PW concedes that it is not going to be easy bringing up ST since he would be a reluctant participant but the PW realises that it is important for her to step in at this stage before it is much too late for her to do anything; and

(r) According to the PW, ST would be surrounded by good role models as the PW's father is one of the pioneer members who contributed heavily in the set-up of Chung Ling High School Butterworth and has been a member of the Board of Governors of Chung Ling High School, Butterworth for many years, and hence would be able to guide ST in his academic progress. The PW's younger brother also stays with the PW's father. He is the chairman of the Board of Governors for Chung Hwa Primary School (Branch 1) where MT is currently studying. ST will be able to stay with MT together with the three children of petitioner's younger brother, aged 6,9, and 11, and will learn the importance of proper behavior in taking, giving, and sharing. The PW's father owns a machinery and hardware trading business which the PW's younger brother and younger sister help to run. Apart from helping to shape ST's and MT's character, attitude, and moral development, they have the flexibility of schedule in helping to take care of logistics arrangement for schooling and tuition classes for ST and MT, and also in times of emergency. According to the PW, there cannot be a better environment for ST to grow up in.

[17] Counsel for the PW rested her case principally on the principles of law as may be distilled from the case of *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48; [2000] 3 CLJ 175 where the court had conducted an overview of the relevant case laws touching on the subject of child custody and the factors that may inform the exercise of the court's discretion in deciding which parent should be given custody of the child. Of course I am mindful that these are only general principles and that each case has to be determined on its own particular and peculiar facts. The principles that were elucidated in that case are as follows:

In matters of custody, care and control of the three daughters, s 88 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) is relevant and it reads as follows:

(1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:

(a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express on independent opinion.

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

The phrase 'paramount consideration' and 'welfare of the child' were judicially interpreted and consist of several factors. The relevant factors are as follows:

The Overriding Consideration Is The Welfare Of The Children

In the case of *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189; [1981] CLJ 65 at p 193 Raja Azlan Shah CJ (as he then was) held:

In short the learned judge has given the overriding consideration of the welfare of the children uppermost in his mind. That, we think, is the correct approach. We would state categorically that that must be first and paramount consideration and other considerations must be subordinate.

The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, and can be effective only if it coincides with their welfare.

The above case of *Mahabir Prasad v Mahabir Prasad* was also followed in the case of *B Ravandran s/o Balan v Maliga d/o Mani Pilai* [1996] 2 MLJ 150; [1995] 1 LNS 21 as to the issue of the welfare of the child being the first and paramount consideration, it was dealt with by the House of Lord in the case of *J v C* [1970] AC 668 where Lord MacDermott held as follows:

The second question of construction is as to the scope and meaning of the words '… shall regard the welfare of the infant as the first and paramount consideration.' Reading these words in their ordinary significance, and relating them to the various

classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood.

That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed. The Mother Is Usually Given Custody Of Young Infants

This principle was enunciated in the case of *K Shanta Kumari v Vijayan* [1986] 2 MLJ 216; [1985] 1 LNS 135; where Wan Yahya J (as he then was) held that:

Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the Courts have always leaned In favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else. In *Kades v Kades* (1961) 35 ALJR 251 the High Court in a joint judgment stated:

What is left is the strong presumption which is not one of law but is founded on experience and upon the nature of ordinary human relationships, that a young girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together.

In *Re Orr* (1972) 2 DLR 77 Muloch CJ commented:

In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father …

The Welfare Of The Child Includes The Moral And Physical Well Being

The welfare of the child both moral and physical should be the paramount consideration in awarding the custody of a child of tender years. In the case of *Kok Yoong Heong v Choong Thean Sang* [1976] 1 MLJ 292 at p 293 it was stated that:

The welfare of the child both moral and physical should be the paramount consideration in awarding the custody of a child of tender years. See *Satpal Singh, an infant* [1958] MLJ 283.

Further, in the case of *Helen Ho Quee Neo v Lim Pui Heng* [1974] 2 MLJ 51; [1974] 1 LNS 48, the Court of Appeal Singapore held that all relevant factors have to be considered including the conduct of the parties and their characters, bearing in mind that the welfare of the child is the first and paramount consideration.

The Children Have The Right To Their Mother's Love And Affection

In the case of *Yong May Inn v Sia Kuan Seng* [1971] 2 MLJ 51; [1970] 1 LNS 176 at p 281 Sharma J in granting custody of three children to their mother held that:

They have a right to their mother's love and affection and no one can do what a mother can do for her children …

… The children are all girls and although it is not absolutely essential that they should remain in the custody and care of their mother, they are bound to feel freeier in her company than in the company of their father and more particularly so when one of them is reaching an age when she may need the advice of her mother most.

Children Of Tender Years Should Have The Benefit Of Being Brought Up By Their Own Mother Rather Than Grandmother.

In the case of *Helen Ho Quee Neo v Lim Pui Heng* [1974] 2 MLJ 51; [1974] 1 LNS 48 at p 53 the Singapore Court of Appeal held:

In our judgment, having considered all the facts, both disputed and otherwise, the proper order to make was to reverse the order for custody made by the judge and order that the appellant should have custody, including care and control over the child and responsibility for its upbringing

This would ensure that during his tender years he would have the benefit of being brought up by his own mother as opposed to being brought up in a haphazard way by others to whom the respondent might feel disposed to entrust his upbringing.

As A Matter Of Human Sense An Infant Is Better With Its Mother And Needs A Mother's Care

In the case of *Masam v Salina Saropa & Anor* [1974] 2 MLJ 59; [1974] 1 LNS 90 at p 60 the High Court held that:

Every case must plainly be determined upon the particular circumstances affecting that case, though, it is of course, true to say that as a matter of human sense an infant is better with his mother and needs a mother's care …

This principle was followed in the case of *B Ravandran s/o Balan v Maliga d/o Mani Pilai* [1996] 2 MLJ 150; [1995] 1 LNS 21 at p 157 Haidar Mohd. Noor J (as he then was) held:

I do not think the love and care of the unmarried niece or, for that matter, of the grandmother, would be the same as that of the natural mother. The four children have been living with the respondent all these years and I do not think it is appropriate that their togetherness should be disturbed because of the matrimonial problems of their parents. They are still very young. However, I am not suggesting that the petitioner has no love for his children.

He has the financial means to make them happy, but that is not the criteria for my consideration on the custody issue.

The Conduct Of The Parties Is Also Relevant

In the case of *Chan Bee Yen v Yap Chee Kong* [1989] 1MLJ 370; [1988] 1 LNS 212 at p 373 Peh Swee Chin J (as he then was) held:

The last factor I had to consider was the conduct of the parties bearing in mind the paramount consideration of the infant's welfare. While the wife complained of lack of any love or affection from the husband, both seemed to accuse each other of being hot-tempered. More probably than not, I found that a lot of their marital problems could have been avoided if the husband had provided a matrimonial home away from her in-laws. Apparently the home of the husband's parents was not regarded by her as such, and in my view for good reasons. She had to live with the relatives of the husband; this was bound to produce a great deal of tension and unhappiness. In my view the husband was certainly aware of the desirability to so stay away and any failure to take such step was conduct which was questionable and the wife's complaint on this score was entirely justifiable.

The hot temper which the wife was said to have could equally be attributed to the husband, for both parties naturally exhibited it when they quarrelled with each other.

There Is A Rebuttable Presumption That It Is For The Good Of A Child Below The Age Of Seven Years To Be With His Mother

In the case of *W v H* [1987] 2 MLJ 235 at p 238; [1986] CLJ 763 Shankar J (as he then was) held that:

The paramount consideration is always the welfare of the child and there is a rebuttable presumption that it is for the good of a child below the age of 7 years to be with his mother.

In General The Courts Dislike Separating Children

In *Bromley's Family Law* (7th Ed), 1987 by Professor BM Bromley and NV Lowe at p 328 it is stated as follows:

Keeping the children together.

In general the courts dislike separating children.

As Dunn LJ said in *Adams v Adams* [1984] FLR 768 at p 772 (CA):

All these cases depend upon their facts, but it is undesirable, other things being equal, that children should be split when they are close together in age and obviously fond of one another … Children do … support one another and give themselves mutual comfort, pethe RHaps more than they can derive from either of their parents.

…

Occasionally this factor can be decisive …

[18] In the present case, it is not disputed that ST is mostly unsupervised during the week and is admittedly doing badly in his studies. The PW is of the opinion that ST would do better if he was with her in the Butterworth residence so that she could supervise him. The PW also alleged that the RH's mother is incapable of controlling ST and as a result ST has become defiant and disrespectful. The PW fears that ST may slide further in terms of his studies and behaviour.

[19] To add spice to the situation, the PW alleges that the RH's absence from Penang is not totally benign and is due to the continuation of the tryst between the RH and the co-respondent in Kuala Lumpur. Obviously, it was as a result of the RH's tryst with the co-respondent that the marriage has evaporated. The view that I took on this issue is that since this was only an interlocutory application, I should therefore refrain from forming any view as regards the alleged continuation of the tryst between the RH and the co-respondent. In all fairness to the RH, he did not deny the tryst with the co-respondent but said that the affair had ended and that he spent time in Kuala Lumpur only for work purposes. However, the PW is not convinced and she harbours suspicion that the relationship is still on-going. She speculates that the RH's trips to Kuala Lumpur are for the very purpose of facilitating the relationship between the RH and co-respondent.

[20] But there is no proof of such continuation of the relationship. This is relevant because the PW has suggested that the RH is an unsuitable parent and has abandoned or neglected ST so that he could continue his relationship with the co-respondent. The RH on the other hand maintains that the relationship has ended and is desirous of patching up with the PW and wanted to repair the damage that he had inflicted upon the marriage.

[21] To this end, I called both the PW and the RH into chambers and made an attempt to reconcile them but to no avail. It was a futile effort on my part and this attempt at reconciliation (for the sake of the children) had to be abandoned and the focus was once again on the issue of who should get custody of ST. The PW was adamant that both ST and MT should be with her and that the RH be given reasonable access. For the RH's part, he said that ST was quite happy staying with him and that his mother (Mdm Lee) is capable of looking after him whilst he (the RH) was away in Kuala Lumpur. The RH wanted the status quo to be maintained.

[22] The PW's response to the RH's suggestion that the status quo be maintained is that ST would naturally want to stay with the RH as that would guarantee his freedom to do as he pleases. Also, the PW says that the RH's mother is quite old and that she is incapable of looking after ST and that she

was more of a maid and a cook rather that someone of authority who could exert authority over ST and supervise his studies and control his behaviour.

[23] In the event, I decided to interview the children (ST and MT) together with their paternal grandmother, Mdm Lee, without the presence of the RH and the PW. After the initial interview with ST, MT and Mdm Lee, the PW and the RH were also called in for a discussion in chambers. The purpose of the interview with the children and the paternal grandmother was to gather more information about the role of Mdm Lee and her views about ST's behaviour as well as the thoughts and feelings of both ST and MT with regard to the present accommodation and schooling arrangement. I conducted a single interview session in chambers which lasted for more than an hour. Those present were Mdm Lee, ST and his sister MT. The interview went well. It appeared to me that both ST and MT got along very well with their grandmother, Mdm Lee. For her part, Mdm Lee said that ST was a good and obedient child. But she did say that he spent a lot of time on the computer, watched the television or did calligraphy. ST was truthful and confirmed that this was what he did mostly when he was at home and said that he was just an average student and that this is how it has been all along. Both ST and MT said that it was the RH who pushed them to study and not the PW.

[24] I should add that during the course of the attempt at reconciling the adults (the PW and the RH), the RH lamented the fact that since the PW and MT moved out of the matrimonial home, MT has stopped talking to him. The PW said that the RH had neglected MT. I decided to broach the topic with MT and asked her (during the interview) as to why she had stopped talking to her father, the RH. Apparently she had decided not to talk to the RH after what had happened between the PW and the RH. Anyway, she eventually agreed to make efforts to patch up with the RH and move on. I must say that the discussion eventually yielded a positive outcome and although I failed in my efforts with the adults, I succeeded with MT and managed to coax her into talking to her father. To that extent she displayed a level of maturity that I found lacking in the adults in this case.

[25] In so far as ST is concerned, he said that he did not want to live in someone else's (meaning maternal grandparents') house in Butterworth. He also said that he wanted to look after his grandmother. I asked Mdm Lee as to what her thoughts were about ST staying in Butterworth and she dia punya suka, meaning she was leaving it to him to decide. The RH also took a similar stand and said that it was a choice that ST had to make and if ST decided to go and stay with the PW then he would be prepared to go along with that, except that if ST were to stay in Butterworth then that would be too taxing on ST as he was in the afternoon school and would have to travel daily from Butterworth to Penang.

[26] To this the PW said that she could transfer ST to a good school in Butterworth. The RH said that the school that ST was currently attending was in fact a very good school and that arrangements had been made for remedial classes for Bahasa Malaysia and other subjects. Thus, the RH was of the view that ultimately it would be best for ST to be with him (in Penang). The RH said that he is doing his best to spend as much time as possible with ST and MT.

[27] As for the behaviour of ST he said that he (the RH) does not tolerate any insolent or disrespectful behaviour. The PW said that there was one occasion when ST had told Mdm Lee to 'shut up'. ST explained that that was when Mdm Lee was nagging him and he just lost his cool and snapped at his grandmother. He said he had apologised to his grandmother. At any rate, upon learning about this episode, the RH chided ST (in my presence) for his rude behaviour towards his grandmother.

THE COURTS FINDINGS (CUSTODY, CARE AND CONTROL)

[28] Generally the court would be very loath to separating siblings and assigning each to one parent. In some situations such a separation (of siblings) is inevitable. In this case, that is exactly the arrangement that came about after the PW moved out in March 2013. She took MT with her. MT is studying in Butterworth. ST stayed on with the RH in Penang. Every weekend the PW and MT visit ST and they all go out together *sans* the RH. When the RH is not in the house, the PW has even taken meals in the matrimonial home. ST appears to me to be an intelligent and highly sensitive and emotional child. The breakup of the marriage between the PW and the RH has definitely taken a toll on both MT and ST.

[29] ST is happy to be with his father and has a doting and caring grandmother to look after him. He promised to work harder in his studies. He is not at all keen on the idea of moving into his maternal grandparents' house in Butterworth. Of course he has no issues with his maternal grandparents or the extended family that stay in that house. He said that he would be quite happy to be with his mother and MT during weekends and holidays. Most certainly he does not want to change school and start all over again in a school in Butterworth. As I said, ST is in Form One this year (2013). He is not a child of tender years and is able to speak intelligently and has clearly expressed his wish to carry on staying with the RH and to continue schooling in Penang.

[30] The critical question now is whether the present arrangement should be allowed to continue which is what the RH wants and the PW does not. I have given this matter considerable thought and kept in the forefront of my mind that this is not about the PW or the RH or what each of them want or desire

and that ultimately what is of paramount importance is whether it would be in the best interest of ST that he should be relocated to Butterworth in terms of upbringing, residence and schooling.

[31] Having given this matter my most anxious consideration, I am of the view that in the long term it would be in the best interest of ST if he relocates to Butterworth and be brought up by the PW. Of course, for ST to move in with the PW in Butterworth and start schooling in Butterworth would entail a host of arrangements and there is no guarantee that a change of school can be made within a matter of weeks such that ST can start school in Butterworth in January 2014.

[32] Even if that is possible, one must consider whether ST will accept the change. He has already said that he is not keen on staying and schooling in Butterworth. Thus, if he is forced to stay and study in Butterworth, it may affect him emotionally or at the very least, cause him to resent the PW for bringing about this change and separating him from the RH and his grandmother.

[33] Also, there is the distinct possibility that ST may just demonstrate his resentment by not applying himself to his studies. As for his behaviour and attitude, first, it is my view (based on my observation during the interview) that ST is not an unmanageable child and that any suggestion to that effect is but an exaggerated one. All that ST may need is a firm hand and in that respect, whilst I am convinced that the RH is a firm individual and can handle ST in terms of his behaviour, attitude and performance in school, the fact remains that the RH is not in Penang for the most part of the week.

[34] In my view, the RH's absence from Penang for the most part of the week erodes his ability to supervise and guide ST. In this respect, I have not glossed over the fact that the PW herself is not a housewife and is in fact a successful career woman and works in Penang. She has to travel daily from Butterworth to Penang. At best, she would be able to spend a few hours with ST at night after her return from work. She said that she would be a better parent in so far as ST is concerned.

[35] In my view, whilst the PW may well be a good parent, that is not to say that the RH is a bad parent. Most certainly, I am not persuaded that the RH has in any respect neglected either ST or MT. It is just that circumstances have made it physically impossible for him to have a meaningful role as a parent. Hence, merely because he has to be in Kuala Lumpur to pursue his work does not turn him into a bad parent. The fact that the RH has to be in Kuala Lumpur for the most part of the week does not of itself disqualify him as a suitable parent.

[36] Of course, the PW has painted a very sinister picture of the RH with respect to his presence in Kuala Lumpur. In this regard, I am able to say that there was absolutely no evidence to suggest that the tryst is continuing and so the PW's allegation in this regard is merely an unsubstantiated one and is the product of deep suspicion over the RH's conduct. As I said earlier, the PW has a theory as to why the RH goes to Kuala Lumpur. But it is an unproven theory. For now, all I have is a factual scenario where the RH has to be in Kuala Lumpur for work and comes back during the weekends to be with ST and MT.

[37] For the record, I have on more than one occasion, given parties ample opportunity to discuss and work things out between themselves so that even if they cannot make the marriage work, then for the sake of the children, they should come to some sort of agreement as to the custody and access arrangements of the children but all efforts in that regard were futile as they kept on bickering.

[38] As such, it fell upon me to make a decision and so with the assistance of counsel who appeared before me, to whom I am grateful for their efforts in trying to get their respective clients to resolve the matter amicably, I have decided, after considering all the factual averments and legal submissions (in particular the principles discussed in *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48; [2000] 3 CLJ 175) and the impressions that I formed from my interview of Mdm Lee, ST and MT, that the status quo or the present arrangement vis a vis ST should not remain.

[39] In my view, the present circumstances are such that only the PW can play a meaningful parental role vis a vis ST in terms of his academic progress.

[40] Also, in my view, it would not be in ST's best interests if were to be separated from his sister, MT. They should be together under one roof so to speak. If they are separated, there is every likelihood or tendency for them to grow up as strangers. If they are under one roof with the PW, then each can find support and encouragement from the other, as siblings usually do. As such, I am of the view that ST should join his sister MT, and for both of them to be brought up by the PW in Butterworth and with reasonable access to the RH.

[41] Mr V Amareson, counsel for the RH said relocating ST to Butterworth would be tantamount to uprooting him from Penang and that this would be most disruptive. In my view, any disruption would only be transient and if at all, would persist only in the initial stages of the process of readjustment. It is in my view, unlikely to cause any major physical, emotional or social or interpersonal issues in the long term. Time will heal all wounds including any emotional distress as may be occasioned by the relocation. Also, given the close

proximity between Penang and Butterworth, the relocation from the former to the latter cannot be regarded as truly disruptive.

[42] No doubt with the relocation from Penang to Butterworth, ST will not be with Mdm Lee in the matrimonial home in Penang and they will miss each other but then again, Butterworth is just less than an hour's drive from Penang. The RH and Mdm Lee can easily keep in touch with ST and MT during the weekdays via mobile phone or *Skype* or other modes of communication. I have allowed weekend and holiday access for the RH, which will mean that Mdm Lee will also be able to be with her grandchildren on those occasions when her son, the RH is with the children.

[43] I am confident that in the long term, things will work out and ST in particular, will be better placed in terms of his academic achievements which to most parents, is the single most important aspect of family life, that is for the children to succeed academically and to gain suitable professional qualification and be well placed in life in terms of a proper job and equipped with or having imbibed proper life values, for which there has to be proper role models and mentors.

[44] The PW believes that the Butterworth residence can provide the requisite environment. I am inclined to agree with the PW. The fact that the PW's father is one of the pioneer members who contributed heavily in the set-up of Chung Ling High School Butterworth and has been a member of the Board of Governors of Chung Ling High School, Butterworth for many years, and hence would be able to guide ST in his academic progress and that the PW's younger brother also stays with the PW's father and is the chairman of the Board of Governors for Chung Hwa Primary School (Branch 1) where MT is currently studying are in my view, not unimportant factors. These are in fact important factors that I took into consideration in leaning in favour of granting custody of ST to the PW. In this respect I do not for a moment think that the RH will resent the fact that ST will be better placed if he were to be under the PW's supervision rather than be given the freedom to do as he pleases in the uncontrolled and unsupervised environment where the only adult who is mostly around is Mdm Lee.

[45] Having said that, I am mindful of the fact that the RH is loving father, who because of his own folly, now finds himself in a predicament of his own doing, but this order as regards care, control and custody is not and should not be regarded as punitive towards the RH. The order made herein was predicated on the child's best interests from the perspective of his overall well being including but not limited to educational, physical and mental (social) development which were all given primary and paramount consideration. In order to ensure that the delicate bond between the RH and the children is not

ruptured by this order, I have endeavoured to ensure that the RH is given a generous amount of weekend/holiday access to both ST and MT. The details of my ruling on control, care and custody for ST and MT are found at the end of this judgment.

MAINTENANCE

[46] Now I will come to yet another difficult part of this application and this is in relation to the claim for maintenance. The PW says that the RH should contribute RM15,000 per month as wife and child maintenance at the rate of RM5,000 per person. The RH says that he can only afford a total of RM3,500 per month. He says that his project in Kuala Lumpur has not come into fruition and so he is unable to pay the amount that the PW is asking.

SUBMISSIONS ON MAINTENANCE

[47] The PW has prayed for maintenance of RM5,000 each for herself and the two children. The PW says that this is not a figure that has been picked out of thin air. The PW says that she has apportioned and itemised the total monthly expenses for herself and the two children (see: exh OMC–9, encl 7) and backed up these figures by showing the average monthly expenses for 2011 and 2012 (OMC–11, encl 17 and OMC–6, encl 22) based on the total net salaries drawn by both parties and spent each month. The total average expenses as can be seen from these figures are in fact higher than the amount estimated/claimed by the PW and the balance will have to be contributed by the PW. The RH has not challenged the expenses quoted and has merely dismissed them as being 'vindictive' and an 'attempt to kill him' (para 21, encl 18).

[48] As regards the RH's ability to pay the sum of RM15,000 claimed, the PW says that the RH also failed to make a full and frank disclosure of his actual income for 2012 or 2013 or challenge the estimate of at least RM25,000 made by the PW with facts and figures of his own and therefore an adverse inference must be drawn against him. The following cases were cited as authority for the proposition that where the husband's affidavits are wanting in particular or truthfulness, then the court is entitled to draw an adverse inference against the husband as regard his means. The cases are: *Koay Cheng Eng v Linda Herawati Santoso* [2008] 4 MLJ 863; [2008] 4 CLJ 105 at p 118 and *Shirley Koo v Kenneth Mok Kong Chua* [1989] 2 MLJ 264 at p 266, but I think that for present purposes it would suffice if I were to quote from the decision of the High Court in *Leow Kooi Wah v Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133 at p 134 where Justice Mahadev Shankar held 'Whatever the disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath, the obligation of the husband is to be full, frank and clear in that disclosure. Any

shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings'. A

[49] It was therefore submitted for the PW that the RH must be deemed to be in a position to pay the maintenance as claimed. The PW says that the RH's claim that he is not earning now cannot, and ought not to be accepted as the letter (exh A, encl 15) was not signed personally by the person purportedly issuing the letter and it was in any case issued by the RH's own company using a computer print out of the company's letter head. The PW also says that it is also inconceivable that the RH had resigned from a job paying RM10,000 a month to join a company which just pays on a project-basis and that he has had no earnings since March 2013. B C

[50] The PW says that since that the RH lives in a luxurious condominium at a rent of between RM3,200 to RM5,500 (OMC–8, encl 22) and (allegedly) continues to maintain the co-respondent, the RH's claim of 'no earnings' is wholly questionable. Then the PW says that the RH's offer to pay RM3,500 a month as maintenance for the children is also indicative of the fact that he is not a 'no income' person but in fact has substantial current and also potential earnings (see: *W v W (No 3)* [1962] 1 All ER 736). The PW also referred to documents showing the current level of business and projects which are in the pipe-line (see: OMC-15 encl 17). D E

[51] The PW also alleged that the RH had previously failed to declare the extra income of RM107,796 he earned in 2012 (para 8, encl 7) and has not been forthright in declaring his actual earnings. It was submitted that the PW's estimate the RH's income being RM25,000 (para 9, encl 7) must therefore be accepted. F

[52] During the entire married life when the parties lived together and when the RH's income was considerably lower than the PW's, she contributed 2/3 of the family expenses and 100% for the accumulation of matrimonial assets. As such, it was submitted that it is therefore only reasonable that the RH contribute substantially towards the maintenance of the PW and the children now that his income is considerably higher. G H

[53] The PW maintains that the fact that she earns a high salary does not disqualify her from receiving maintenance, as the PW had never hesitated to bear a major proportion of the family expenses notwithstanding that it was the primary duty of the RH to maintain her and the children. It was accordingly submitted that the PW and the children are entitled to enjoy the same standard of living as when they lived together (see: *Koay Cheng Eng v Linda Herawati Santoso* [2008] 4 MLJ 863 at p 876; [2008] 4 CLJ 105 106 at p 118). I

[54] It was submitted for the PW that in assessing maintenance the court should look at not only the means and needs of the parties but also have regard to the degree of responsibility which the court apportions to each party (see: *Koay Cheng Eng v Linda Herawati Santoso* [2008] 4 MLJ 863 at pp 864–876; [2008] 4 CLJ 105 pp 106–118).

[55] According to the PW, the RH should also be ordered to pay arrears as prayed for as the RH has not denied that he has failed to maintain the PW and the children from the time he left the matrimonial home. In addition the PW is claiming an annual increment of 8% to cater for the increase in expenses and the cost of living for the PW and the children. The PW is also asking for an order the attachment of the RH's salary.

[56] On the other hand, the RH's response was encapsulated in the submissions of Mr V Amareson, counsel for the RH who said that, the PW is asking for way too much whilst she is herself gainfully employed. He said that the RH has produced the 'best evidence' available and that the court should accept it as being truthful evidence and fix the quantum of maintenance based on his ability.

[57] And so, that really begs the question as to what exactly is the RH's ability to pay? In this regard, it is apposite to note that it not infrequently happens in matrimonial cases that the husband (in most cases) tries to hide or camouflage his assets by resorting to various legal and other devices. It is of course not an uncommon feature in cases of this type for the complaint to be made (mostly by the wife) that the husband is 'hiding considerable assets'.

[58] Ms. Lalitha Menon didn't put her case in that fashion but she came close to saying so. She said that whatever evidence that the RH was relying upon to bolster his case that he is of meagre means was inherently incredible and not capable of belief. She said that the RH was not forthright and did not make full and frank disclosure. She said that he was not truthful to the court and has not been candid with his source of and level of income and how it is spent.

[59] Indeed she says that to the extent that the RH says that he has been looking after ST, the RH has not even provided a breakdown of how much he has spent on ST on a monthly basis. All that the RH has done is to debunk the PW's calculations but he never came up with his own income figures. His answers are by way of general denials.

[60] All that he could muster is to say that his projects in Kuala Lumpur have not materialised. Of course, it has to be borne in mind that he was earning RM10,000 per month when he worked for Neptune Freight Services Sdn Bhd in Penang. He did not provide any income tax returns for 2012/2013 or other

satisfactory documentary evidence as would provide a credible basis for this court to form an opinion as to his actual ability to pay maintenance.

[61] Presently, the only evidence that the RH has presented are some letters from companies that are either owned by or controlled by him. So the question naturally arises whether the RH would have left a lucrative job in Penang and gone to Kuala Lumpur for a meagre income. In this regard, I accept that there could be all sorts of reasons which would have impelled the RH to leave his job in Penang in search of better prospects of making money in Kuala Lumpur. It seems to be clear that the RH was attempting to be an entrepreneur in Kuala Lumpur and these could well be early days in the start-up of the business and it will be months and years before the investors/stakeholders etc see the profits rolling in.

[62] In some cases, investors or entrepreneurs have had their 'fingers burnt' by dabbling in business ventures which they are not familiar with. In the present case I cannot tell one way or the other, whether the RH is telling the truth or not. But at the same time I cannot accede to the suggestion that the RH has displayed the best evidence such that I should accept it as the truth.

[63] As I said, such situations arise frequently in the family court. This is poignantly demonstrated in the recent case of *Young v Young* [2013] EWHC 3637 (Fam) where Justice Moor had to grapple with an extreme case where the husband said he was a bankrupt and penniless, whereas the wife said that he was worth millions and was hiding considerable assets.

[64] At the 20 day final hearing in the financial relief proceedings the court heard evidence from 22 witnesses. The judge found that Mr Young was dishonest. Along with finding numerous examples of Mr Young's dishonesty the court held that Mr Young had removed share certificates worth approximately £20m from a solicitor's office and then denied they ever existed.

[65] In summary, the court held that Mr Young had assets of around £45m in total hidden from the court. Deducting £5m for his debts, the net total was £40m. Mrs Young was found to be entitled to half — a lump sum of £20m. This also happened to equate with the court's view of her reasonable needs, generously assessed. The judge ordered Mr Young to pay this sum in 28 days.

[66] This is how the learned judge approached the problem posed by the inadequate or paucity of evidence that was presented to him as regards the husband's means. He said:

… It follows that my sole task is to determine his true financial position. 17. The wife's case is that he is hiding very considerable assets. She alleges that he is worth 'many hundreds of millions of pounds' or even that he is worth 'a few billion at least' His case is that he is insolvent with a deficiency of £28m. I remind myself that the burden of proof is on he or she who seeks to assert a positive case as to disputed facts, although it is for the respondent to the application to provide to the applicant and the court all the relevant information. This has been described as the duty to provide full and frank disclosure.

18. The standard of proof is the civil standard, namely the balance of probabilities. There have been a number of authorities over the years as to how the court should deal with cases involving alleged non-disclosure. In *J v J* [1955] P 215, Sachs J said at p 227:

In cases of this kind, where the duty of disclosure comes to lie upon the husband; where a husband has - and his wife has not - detailed knowledge of his complex affairs; where a husband is fully capable of explaining, and has the opportunity to explain, those affairs, and where he seeks to minimise the wife's claim, that husband can hardly complain if when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference - especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative.

19. And at p 229, he said:

… it is as well to state expressly something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court. Whether that disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath (not least when that evidence is led by those representing the husband), the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings — insofar as such inferences can be properly drawn.

20. These passages were approved in *Baker v Baker* [1995] 2 FLR 829, where Butler-Sloss LJ said that the principle had been accepted for over forty years where a spouse was found to have lied and to have been guilty of material non-disclosure of relevant financial information. It continues to apply. *It has been said that it is up to the respondent to open the cupboard door and show that the cupboard is bare. If he does not do so, the court can draw the inference that the cupboard is not bare. As explained in Baker, this is not an improper reversal of the burden of proof. It remains for the applicant to prove her case. A failure by the respondent to discharge the duty of providing full and frank disclosure can, however, lead the court to draw inferences that are appropriate.*

21. There are issues in the case as to the extent to which the husband has lied to this court and/or to others. Indeed, it is part of his case that he has misled banks and individuals as to his financial circumstances in the past but he says he has told me the

entire truth. First, I must decide whether or not he did deliberately tell lies. If I find that he did, I have to ask myself why he lied. The mere fact that someone tells a lie is not in itself evidence that the person concerned had undisclosed assets. An individual may lie for many reasons. They may possibly be 'innocent' ones in the sense that they do not denote a false presentation of his current financial position. They may be lies to bolster a true case; or to protect someone else; or to conceal some other disreputable conduct or out of panic, distress or confusion. In this case, earlier lies may have been intended to conceal a collapsing financial empire. More recent ones may have been to conceal previous wrong doing.

22. It follows that, if I find that the husband has lied to me, I must assess whether or not there is an 'innocent' explanation for those lies that does not support the wife's case that he has hidden assets. However, if I am satisfied that there is no such explanation, I can take the lies into account in my assessment of his case that he is penniless and hopelessly bankrupt.

23. There has been some debate as to the relevance of the fact that the husband remains an un-discharged bankrupt I accept that any assets that were owned either beneficially or legally by the husband on 9 April 2010 (when he was made bankrupt) are now vested in his joint trustees in bankruptcy (section 306, Insolvency Act 1986). Pursuant to *Re Holliday (A Bankrupt)* [1981] Ch 405, the court is therefore precluded from making property adjustment orders. The court is not, however, precluded from making a lump sum order, provided consideration is given to the level of his debts, statutory interest and the costs of the insolvency when weighing in the balance the quantum of any lump sum order (see *Hellyer v Hellyer* [1996] 2 FLR 579).

[67] Applying the *Young v Young* approach to this issue, I am simply not able to view the RH's response as to his so-called meagre means in a benign light. The RH did himself no favour by disclosing only the barest minimum of information and that too which was not necessarily credible. In my view, it does not at all appear that the RH had laid bare the metaphorical cupboard for curial scrutiny. Rather I think that there has been selective presentation of the financial affairs of the RH. The affidavits of the RH and the documents that he has exhibited have all been heavily criticised by Ms Lalitha Menon and I might add, rightly so. The RH has not been forthright and has not revealed the true state of his financial position. It is hardly likely that the RH would have left a lucrative job with Neptune Freight Services Sdn Bhd and allowed himself to be left with a meagre income such that he can only offer RM3,500 as child maintenance and no maintenance at all for the PW.

[68] Of course, the PW has asked that I drew the necessary adverse inference and assume that the RH can afford whatever that she is asking. In other words, the PW has asked that I should draw an inference that the RH's income is RM25,000 per month. I am not sure that I can or should accede to that invitation as this is only an interim order and I have not had the benefit of any oral testimony one way or the other. At the same time, I cannot accept whatever

the RH has alluded to in his affidavit as the gospel truth and conclude that he is a man of meagre means or that RM3,500 is all that he can afford. All I can say quite confidently at this juncture is that his financial affairs are shrouded in mystery. This may yet be unraveled at the trial of the divorce petition but that is for a later day.

[69] For now, I have to decide on the appropriate quantum which is to be fixed as child and wife maintenance which will be based on the RH's income and his net disposal income of which there is hardly any credible information before the court. I have therefore taken his previous income at Neptune Freight Services Sdn Bhd (RM10,000) as the benchmark and made the assumption that he must be making or taking home much more than what he previously earned with his previous employer and that his new project(s) in Kuala Lumpur (whatever they may be) would probably be yielding a better income for the RH.

[70] Taking all the facts and circumstances into consideration and doing the best I can with the information that has been presented to the court, it is my view that it would be appropriate to assume that the RH will be able to contribute a minimum of RM10,000 towards child and wife maintenance, which I have apportioned into RM4,000 as wife maintenance and RM6,000 as child maintenance (globally) for both ST and MT. I made no order as to attachment of salary as the source(s) of the RH's income was uncertain at this juncture. I also did not provide for any annual increase of maintenance as this should be explored and ventilated, if at all, at the trial of the divorce petition.

RULING

[71] *Custody, care and control*: The PW to have custody, care and control of Stanley Tan Yun Chih ('ST') and Megan Tan Rou Yi ('MT'). Both ST and MT are to live with the PW at No 2 Lorong Aman 7, Taman Robina, 13050, Butterworth, Penang until such time that the PW finds her own accommodation. ST is to start living with the PW before the start of the new school year in January 2014.

[72] *ST's schooling*: The PW is to make immediate arrangements to transfer ST from Heng Ee High School in Penang to Chung Ling Butterworth High School or such other secondary school in Butterworth as deemed fit and appropriate by the PW.

[73] *Overnight access for the RH*: The RH to have overnight access of ST and MT from 9am on Saturdays to 6pm on Sundays (during school term) every week.

[74] *School holiday access*: During year end school holidays: First half of the holiday term ST and MT are to be with the RH and second half with the PW. During mid-term school holidays: First half of the holiday term ST and MT are to be with the RH and second half with the PW.

[75] *Chinese New Year*: During alternate Chinese New Year ('CNY') festival ST and MT to spend CNY eve (starting from 6pm) and first day of CNY with the RH and for both children to be sent to the Butterworth residence on the second day of CNY by 10am. This arrangement will start with CNY 2014 wherein both ST and MT will be with the RH commencing from 6pm on Thursday 30 January 2014 (eve of CNY) until 10am on Saturday 1 February 2014.

[76] *Child maintenance*: With effect from 1 January 2014, the RH to pay global sum of RM6,000 per month to the PW as child maintenance for ST and MT. The RH to pay arrears of child maintenance of RM3,000 per month from March to December 2013 (RM3,000 x 10 months) which is to be fully settled by 30 March 2014.

[77] *Wife maintenance*: The RH to pay RM4,000 per month as wife maintenance. The RH to pay arrears of wife maintenance of RM4,000 per month from March to December 2013 (RM4,000 x 10 months) which is to be fully settled by 30 March 2014.

[78] *Costs*: RM8,000 to be paid by the RH to the PW.

[79] *Liberty to modify*: Parties are at liberty to agree (in writing) as between themselves to any modification of the CNY or holiday arrangements or time period for payment of maintenance or arrears as they deem fit and appropriate in the circumstances without the need for any variation of the order herein.

[80] *Liberty to apply*: Parties are at liberty to apply.

Order accordingly.

Marriage dissolved and appropriate orders made for custody of children and maintenance with costs of RM8,000 to be paid by RH to PW.

Reported by Kohila Nesan